No. 80-622

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL AJLOUNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when he was overheard in the course of warrantless electronic surveillance for foreign intelligence, and whether the fruits of that surveillance were improperly admitted into evidence at trial.

2. Whether the "border search" exception to the warrant requirement applies only to searches of imported items.

3. Whether stolen goods that were delivered by petitioner to a loading dock for shipment to a foreign country, but were seized before they left the United States, were in "foreign commerce" within the meaning of 18 U.S.C. 2314.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 629 F.2d 830. The opinion of the district court (Pet. App. 27a-75a) is reported at 476 F. Supp. 995.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transporting stolen goods in foreign commerce, in violation of 18 U.S.C. 2314.[1] He was sentenced to two years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-26a).

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[1] The jury was unable to reach a verdict on an additional 136 counts of wire fraud (18 U.S.C. 1343).

The evidence showed that in March 1978, investigators for the New York Telephone Company alerted Customs agents that petitioner had made several "blue box" telephone calls to the Middle East (Pet. App. 3a).[2] The investigators also said that petitioner had attempted to stop the telephone company's investigation by warning that it was endangering the lives of persons in the United States and Israel (*ibid.*). Customs agents later learned that some of the blue box calls placed from petitioner's residence were made to Palestine Liberation Organization (PLO) headquarters in Beirut, Lebanon (*ibid.*).

On April 8, 1978, in the course of surveillance to determine whether petitioner was making blue box calls from telephone booths near his home, Customs agents followed petitioner to a nearby shopping center. There they saw him supervising the loading of a large cargo container (Pet. App. 3a; Tr. 776-778). The agents learned that the container was leased by petitioner and was scheduled for shipment to Qatar on April 17 (Pet. App. 3a).

On that date, the agents located the cargo container in the customs control area of a Brooklyn pier (Pet. App. 3a). The dock receipt stated that the container held air conditioning equipment (*ibid.*). Knowing that petitioner worked for a cleaning firm that had no connection with air conditioners, and that petitioner was affiliated with the PLO, the agents opened the container (*id.* at 3a-4a & n.2, 71a

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[2] A "blue box" is a device that allows long-distance telephone calls to be made without charge to the maker. The blue box simulates the tones and sounds used by the telephone company and enables the user to make the calls without generating any records (Pet. App. 2a).

n.5).[3] Inside was a variety of sophisticated teletype and telecommunications equipment, but no air conditioners. Telephone company investigators identified some of the equipment as stolen property (*id.* at 4a).

ARGUMENT

1. Petitioner contends (Pet. 14-34) that his Fourth Amendment rights were violated by warrantless electronic surveillance, and that the courts below erred in refusing to suppress the fruits of that surveillance.[4] For a variety of reasons, this claim is without merit.

To begin with, there was no violation of petitioner's constitutional rights. While this Court has not decided the question whether the President, without prior judicial approval, may authorize electronic surveillance to gather foreign intelligence in the service of national security (see *United States* v. *United*

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[3] The agents also knew that petitioner was licensed to carry a gun and had previously attempted to import three guns into New York (Pet. App. 4a n.2).

[4] We note that, while petitioner was the subject of electronic surveillance, neither the prosecutors nor defense counsel had access to the tapes of the intercepted conversations. Thus, the record in this case is barren of any information concerning the location at which petitioner's conversations were monitored, the parties to those conversations and the contents of the conversations. Prior to trial, the government submitted to the district court sealed packages containing recordings of the intercepted conversations. These recordings were reviewed *in camera* by the district court and the court of appeals. Both courts found that the conversations were lawfully intercepted in the course of legitimate foreign intelligence surveillance (Pet. App. 18a, 70a-71a n.2). In addition, the district court found that the criminal investigation and prosecution of petitioner were not the fruits of the electronic surveillance (*id.* at 70a n.2).

States District Court, 407 U.S. 297, 308-309, 321-322 (1972)), every appellate court that has confronted the issue directly has concluded that the Constitution permits the President to exercise this authority. See *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 913-914 (4th Cir. 1980); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); but see *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (dictum).[5] As the Fourth Circuit recently observed in *United States* v. *Truong Dinh Hung*, *supra*, there are several compelling considerations that militate against imposition of a uniform warrant requirement for foreign intelligence surveillances (629 F.2d at 913-914; footnote omitted):

> First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. * * *

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[5] *Zweibon*, unlike the present case, involved electronic surveillance of members of a domestic organization whose actions had an effect on foreign relations, but who acted neither as agents of nor collaborators with a foreign power. 516 F.2d at 651.

> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. * * *
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. * * *
>
> In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. * * *

After an *in camera* review of the wiretap records, the district court concluded that petitioner's conversations were intercepted in the course of foreign intelligence surveillance of legitimate concern to the national security (Pet. App. 70a-71a n.2). The court of appeals, after a similar review of the same materials, agreed with the district court's assessment "that this was a foreign intelligence surveillance, justifiably and reasonably conducted" (*id.* at 18a). Thus, the surveillance, which was for legitimate foreign intelligence purposes, did not violate the Fourth Amendment because it was conducted without prior judicial authorization.

In any event, as the court of appeals correctly concluded (Pet. App. 18a-23a), it would be inappropriate to apply the exclusionary rule in this case, even assuming that petitioner's rights had been violated by the surveillance and that the violations had produced

evidence used at trial.[6] The primary, if not the exclusive, justification for the exclusionary rule is the deterrence of illegal police conduct. *Stone* v. *Powell*, 428 U.S. 465, 485-486 (1976).[7] But the national security surveillance here was not undertaken in the service of any purpose ordinarily identified with the police or with criminal law enforcement generally; accordingly, suppression would not have been an effective deterrent. Moreover, unlike the typical case in which an excessive official intrusion results from misjudgment or overzealousness of an officer in the field (see, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979)), the intrusion in this case was (Pet. App. 14a):

> * * * authorized by the Attorney General pursuant to the power delegated to him by the President of the United States in the exercise of his authority relating to the Nation's foreign affairs as described in 18 U.S.C. § 2511(3), to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain counterintelligence (including foreign) information deemed essential to the security of the United States, and to protect national secur-

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[6] As noted earlier (see note 4, *supra*), the district court found that the intercepted conversations did "not concern the subject matter of the indictment, and were not used to initiate the investigation concerning the crimes charged" (Pet. App. 70a n.2).

[7] Although the exclusionary rule has also been described as protecting the integrity of the judicial process from the taint of illegally seized evidence, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the exclusionary rule in a particular context. *Stone* v. *Powell*, *supra*, 428 U.S. at 485.

ity information against foreign intelligence activities.

It is unlikely that officials conducting surveillance to gather information "essential to the security of the United States," and acting at the essential direction of the President, will be—or ought to be—deterred in their operations by the prospect that incidental discoveries will not be usable at a criminal trial.

In addition, even assuming that the exclusionary rule's deterrent purpose is relevant here, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *United States* v. *Peltier*, 422 U.S. 531, 542 (1975). Because the prevailing view of the federal courts at the time of the interceptions was that no warrant was required to conduct foreign intelligence surveillance (see cases cited at page 4, *supra*), the agents could reasonably have believed that their conduct was not unlawful. Thus, even if petitioner's rights were violated by the surveillance, nothing in the Fourth Amendment or the exclusionary rule requires suppression of the fruits of that surveillance. See *United States* v. *Peltier*, *supra*, 422 U.S. at 542; *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc), petition for cert. pending, No. 80-5613.

Finally, and perhaps most importantly, this question does not merit review because it is of limited practical significance in light of Congress' enactment of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. III) 1801-1811. This Act, which was adopted with the support of the Executive Branch (see H.R. Rep. No. 95-1283, 95th Cong., 2d Sess. 13-

14 (1978)), requires prior judicial authorization for foreign intelligence electronic surveillance, while simultaneously protecting the President's need to act swiftly and secretly.[8] The warrant requirement imposed by the Act will, presumably, reduce or eliminate altogether future instances of warrantless national security electronic surveillance. Accordingly, there is no occasion for the Court to decide now whether the Constitution independently imposes a warrant requirement for surveillance of this character. As the court of appeals accurately noted (Pet. App. 23a), "[t]hough the exclusionary rule remains

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[8] Sections 102(a)(3) and 103(c) of the Act, 50 U.S.C. (Supp. III), 1802(a)(3) and 1803(c), safeguard the overriding needs of secrecy by providing that the warrant applications shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence. Disclosure of applications is strictly limited by Section 106(f), 50 U.S.C. (Supp. III), 1806(f). The President is assured that his application for a warrant or an appeal from its denial will not encumber his authority to gather necessary intelligence information with dispatch. Section 105(e), 50 U.S.C. (Supp. III) 1805(e), permits the use of electronic surveillance without a warrant for up to 24 hours in emergencies, and Section 103 requires the courts to expedite their review of warrant applications. The Act allows an initial surveillance of up to 90 days (and of up to one year where the target is a foreign power), with extensions for one year (Section 105(d)(1)(2)). Only seven judges, appointed by the Chief Justice, are empowered to pass on government applications, and review of their decision is confined to a specially-designated panel of three judges and to this Court on an expedited certiorari procedure (Section 103). The Act does not require that an application for a warrant make out probable cause in the traditional sense; rather, it confides to the exclusive discretion of the President and designated officials in the Executive Branch the decision that the information sought is foreign intelligence information and that the electronic surveillance is needed (Section 105).

available in the event the new statutory requirements are not observed, there is little if any need to apply the rule to a possible Fourth Amendment violation now that agents' conduct in the future will normally be guided and measured by statutory standards."

2. Petitioner next argues (Pet. 35-47) that the "border search" exception should not apply to export searches and that therefore the search of the cargo container was improper because it was conducted without a warrant and without probable cause. This claim is also without merit.

As the court below recognized (Pet. App. 7a), application of the border search doctrine depends not upon the direction in which goods are travelling, but rather upon a nexus between goods and the border. See *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63 (1974) ("[T]hose entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment * * * "); *United States* v. *Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979); *United States* v. *Stanley*, 545 F.2d 661, 665-667 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978); *Samora* v. *United States*, 406 F.2d 1095, 1098-1099 (5th Cir. 1969).

While the border exception has commonly been applied in the context of searches conducted upon entry into this country, rather than upon departure, there is no reason to devise different rules to govern exit border searches. The governmental interest in preventing illicit international drug trafficking and other forms of smuggling is not restricted to controlling incoming contraband. Indeed, the Controlled Substances Import and Export Act criminalizes exportation as well as importation of illegal drugs. 21 U.S.C. 953. While illicit drug trafficking may more

commonly involve importation into rather than exportation from the United States, the opposite is true with respect to other commonly smuggled goods, such as firearms. See *United States* v. *Gonzalez-Rodriguez*, 513 F.2d 928 (9th Cir. 1975); *Samora* v. *United States*, *supra*. Moreover, the cooperation of foreign nations in controlling the traffic in illicit drugs is dependent in part on this country's efforts to control the export of drugs and other contraband.[9]

Here, the container that was searched "was located on a pier, within a customs area, and marked for shipment abroad" (Pet. App. 7a). Accordingly, the search was a valid border search and was "reasonable" even in the absence of a warrant and probable

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[9] Contrary to petitioner's contention (Pet. 35), the decision below does not conflict "with numerous decisions of this Court * * *." In fact, this Court has never held that the "border search" exception applies only to imported items. The decisions from other courts upon which petitioner relies (Pet. 40-42) also do not conflict with the court of appeals' decision here. *Corngold* v. *United States*, 367 F.2d 1 (9th Cir. 1966), involved a search of packages that were being shipped from Los Angeles to New York. The cases of *United States* v. *Marti*, 321 F. Supp. 59 (E.D.N.Y. 1970), and *People* v. *Esposito*, 37 N.Y.2d 156, 332 N.E.2d 863, 371 N.Y.S.2d 681 (1975), involved the construction of statutes not at issue in this case. Petitioner's reliance (Pet. 42) on 22 U.S.C. 401(a) is similarly misplaced. This statute imposes a probable cause requirement for *seizures* of arms sought to be exported in violation of law. As the court below explained (Pet. App. 10a; footnote omitted), "[t]hese provisions were primarily designed to protect innocent owners and claimants from the inconvenience and expense associated with unwarranted seizure and detention of their property. * * * There is no indication, however, that the law was also intended to protect persons against the less serious interference with property rights associated with a customs search."

cause. See *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Moreover, the search was conducted in a reasonable manner and, as the district court found (Pet. App. 51a-52a), was based upon reasonable suspicion. Accordingly, the courts below properly denied petitioner's motion to suppress the stolen equipment found in the search of the cargo container.

3. The evidence showed that the cargo container was placed in a restricted dockside customs area and was handed over to a shipping company three days before the search (Tr. 781-782). The shipper had actual possession of the container; only the Customs agents' intervention prevented the equipment from being loaded aboard ship and reaching its intended foreign destination. Petitioner claims (Pet. 48-58), however, that the evidence failed to show interstate or foreign transportation of the stolen items, as required by 18 U.S.C. 2314, because there was no actual border crossing.

Petitioner's argument flies in the face of common sense and the legislative intent of Section 2314. To construe the statute in the way petitioner proposes would lead to the absurd result that, after discovering stolen property about to be shipped to a foreign destination, customs agents must permit the property to be loaded onto the ship, escort the ship to the international boundary line,[10] and wait until the ship's hull crosses the line before ordering the ship back to port so that the stolen cargo may be seized to form the basis for a prosecution under the statute. The court of appeals correctly concluded (Pet. App. 13a) that "Congress was not aiming only at stolen goods

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[10] The international maritime border is located a distance of three miles from the coast. See *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 122 (1923).

moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing, including at least goods at a dockside customs area." In construing statutory language similar to that used in Section 2314, the courts consistently have held that no border crossing is required where, as here, the shipment has been placed in the hands of a carrier destined for a different state or country (see cases cited at Pet. App. 13a (construing 18 U.S.C. 659)).[11] Petitioner's claim that Section 2314 grew from a uniquely narrow legislative purpose is wrong. The legislative histories of Sections 2314 and 659 show that in enacting each of these statutes Congress was concerned with the problem of felons evading state prosecution by using the facilities of interstate and foreign commerce. See 49 Cong. Rec. 1781 (1913) (remarks of Sen. Cummins); 78 Cong. Rec. 2947 (1934) (letter of Attorney General Cummings).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

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[11] As the court below noted (Pet. App. 12a n.9), none of the cases on which petitioner relies involved the question whether Section 2314 "reaches items at a border imminently to be transported across it."

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